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No. 89-1556

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1989

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MARGARET T. WHITACRE,
*Petitioner*

v.

JAMES F. DAVEY,
*Respondent*

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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit**

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## REPLY BRIEF OF PETITIONER

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### ARGUMENT

We explained in our principal brief that the lower court's requirement that Ms. Whitacre allege direct evidence of motive in her *Bivens* complaint is unprecedented and indefensible. Respondent does not even attempt to defend the Court of Appeals' "direct evidence" rule. Rather, he tries to skirt the issue by recharacterizing the lower court's opinion as a "factbound" analysis of the circumstantial evidence in the complaint. Opp. at 6.

The issue posed by this petition cannot be sidestepped. The opinion below quite plainly required Ms. Whitacre

to allege nothing short of direct evidence of discriminatory intent in order to satisfy the "heightened pleading standard" applied to *Bivens*[1] claims in the District of Columbia Circuit. Indeed, the Court of Appeals reads and applies *Whitacre* exactly as petitioner does:

> *Whitacre* makes clear that discovery is not to be allowed until plaintiff has alleged the existence of *direct evidence of motive.*

*Siegert* v. *Gilley*, 895 F.2d 797, 802 (D.C. Cir. 1990) (emphasis added), *reh'g and reh'g en banc denied.* The requirement of direct evidence in the context of a qualified immunity claim is squarely in conflict with the law in other circuits.

1. The problem with the District of Columbia Circuit's "direct evidence" rule is real, not simply semantic. While both direct and circumstantial evidence are equally competent to prove disputed facts, direct evidence (such as an admission or eyewitness testimony) of motive is rare—and without any discovery it is almost invariably beyond reach. The requirement established in the opinion below, and applied in *Siegert*, plainly requires a plaintiff to have a "smoking gun"—direct evidence that establishes the alleged discriminatory motive. *See, e.g., Siegert* v. *Gilley*, 895 F.2d at 804 (identifying the type of direct evidence that will meet its standard—memoranda expressly setting forth the unconstitutional motive). As we explained in our petition (e.g., Pet. at 13), such a requirement is found nowhere else in our jurisprudence. To impose it in *Bivens* cases alleging unconstitutional motive would mean that such motive is "never provable." *Cramer* v. *United States*, 325 U.S. 1, 31 (1945). And in the specific context of this employment discrimination case, a "direct evidence" requirement breaks with well-established principles of proof.

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[1] *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

a. Of equal concern is respondent's attempt to treat "proof" and "pleading" as interchangeable. This confusion is admittedly echoed in the D.C. Circuit's opinions explaining its "heightened pleading standard." Nonetheless, the distinction is of obvious importance. Complaints contain allegations that plead facts. Complaints do not by any stretch of the imagination *prove* facts. Facts are proved at trial (or, if undisputed, in a properly supported motion for summary judgment). And trial is conducted *after* an opportunity for discovery.[2] It is only after a fair opportunity for such discovery that our judicial system contemplates "proof" of any fact—particularly of facts uniquely in an opposing party's possession. Thus, to examine fact allegations pleaded in a *Bivens* complaint under standards established for *proof*, as respondent does in its opposition, hopelessly garbles civil process, and demands the impossible.

In addition, the requirement of the D.C. Circuit collides with the restraints of Rule 11. Rule 11 imposes mandatory sanctions for the filing of a pleading containing allegations that are not supported by an investigation into the facts. Fed. R. Civ. P. 11. *See Cooter & Gell* v. *Hartmarx Corp.*, 58 U.S.L.W. 4763 (S. Ct. 1990) (endorsing imposition of sanctions on party whose prefiling investigation had not produced sufficient facts to support existence of alleged conspiracy). At the same time, the court below *requires* a plaintiff to plead facts that it does

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[2] Discovery, of course, can be narrowly limited if a threshold issue—such as qualified immunity—is potentially dispositive of the case. Discovery is no license to root through a party's files or to depose every individual with even the most tangential relationship to the claim. As a practical matter, individual private plaintiffs rarely can afford such extensive discovery, and federal trial courts commonly impose sharp limits on discovery either by general rules or specific orders. In any event, trial courts are accustomed to tailoring discovery, when appropriate, to focus on such threshold issues. *E.g.*, *Webster v. Doe*, 486 U.S. 592, 604 (1988).

not and, without limited discovery, *cannot* know—or to face dismissal of a claim seeking redress for violation of constitutional rights. The decision below and Rule 11 thus put victims of official discrimination in an inescapable vise: they cannot verify what they must allege and they cannot allege what they are unable to verify.

b. The Court of Appeals required Ms. Whitacre to plead direct evidence of Davey's discriminatory motive in her complaint, and it affirmed the trial court's dismissal because it found none. In *Siegert* v. *Gilley*, the Court of Appeals did the same thing again. Respondent's position—that the lower court would accept allegations of circumstantial evidence of intent in a *Bivens* claim—is dead wrong. It ignores the clear rule established and applied by the lower court—that under the heightened pleading standard, discriminatory intent must be pleaded with "direct as opposed to merely circumstantial evidence of the intent." *Siegert* v. *Gilley*, 895 F.2d at 802. *See Whitacre* v. *Davey*, 890 F.2d 1168, 1171 n.4 ("if a plaintiff failed to allege direct evidence of unconstitutional intent, his claim must be dismissed immediately.")[3] There is no room for argument on this point: the Court of Appeal's "direct evidence" rule was the basis of the decision below.

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[3] Respondent's principal contention is that the lower court examined as "circumstantial evidence" the allegations of Davey's historical hiring choices in paragraph 19 of the Amended Complaint, and held that they failed to "prove" discrimination. Opp. at 7-9. The Court of Appeals noted at the outset that this evidence "is still circumstantial rather than direct evidence." 890 F.2d at 1172. There is no indication that the court relaxed in any way its "direct evidence" rule. Further, as we explain, *supra*, what these allegations "prove" or do not "prove" is not the issue. And in any event, the allegations of circumstantial evidence of discriminatory motive are not limited to paragraph 19 of the Amended Complaint. Rather, the undisputed facts alleged in the complaint *as a whole* set out the circumstances supporting the conclusion that the decision not to select Ms. Whitacre was based on her age. *See* Petition at 2-4. The objective evidence of Davey's historical selections is simply additional, corroborative circumstantial evidence of motive.

2. Respondent also mischaracterizes the state of the law in an attempt to gloss over the split between the circuits. Opp. at 9-10 n.5. The Sixth Circuit, however, in *Crutcher* v. *Kentucky*, 883 F.2d 502 (6th Cir. 1989), squarely and unequivocally rejected the very "direct evidence" rule endorsed and applied by the lower court in this case. The court in *Crutcher* explained:

> It is true that *Poe* [v. *Haydon*] states that 'the plaintiff must present direct evidence that the officials' actions were improperly motivated in order to' resist a qualified immunity summary judgment motion. This does not mean that [the plaintiff] must bring in an admission from the lips of her defendant. She may rely on proof that would be strong enough to allow a jury to return a verdict for her under appropriate instructions, and it is clear that the law allows victims of race discrimination, as in other cases, to prove their cases by inferential and circumstantial proof. To the extent that [defendant] reads *Poe* to set a higher standard for qualified immunity than applies on the merits, he is wrong.

*Crutcher* v. *Kentucky*, 883 F.2d at 504 (citation omitted). To the extent that respondent asserts that the Sixth Circuit is "unsettled" on this issue, he is wrong.[4]

The split is clear. The decision below—which requires direct, non-circumstantial evidence of motive to overcome a qualified immunity defense—simply cannot be reconciled with that of the Sixth Circuit, which does not require direct evidence. Cases from other circuits, cited in our petition, underscore the ongoing confusion courts have demonstrated in their attempts to apply the "heightened pleading standard."

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[4] Indeed, the Sixth Circuit has recognized that the issue of qualified immunity at times may not be resolved without some discovery, to enable a plaintiff to gather and present the facts necessary to a claim. *E.g.*, *Achterhof* v. *Selvaggio*, 886 F.2d 826, 831 (6th Cir. 1989).

## CONCLUSION

The petition for writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit should be granted.

Respectfully submitted,

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